Supreme Court, U.S.
FILED
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(3)

No. 85-1973

In The

Supreme Court of the United States

October Term, 1986

RICHARD POPE and
CHARLES G. MORRISON,
Petitioners,

vs.

STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

JOINT APPENDIX

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Petition for Certiorari filed May 30, 1986
Certiorari Granted October 6, 1986

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NOTATION REGARDING ITEMS ALREADY REPRODUCED

The following opinions and statutes have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the Second District Appellate Court for the State of Illinois in *People v. Pope*, dated November 26, 1985 ..... App. 1

Opinion of the Second District Appellate Court for the state of Illinois in *People v. Morrison*, dated November 26, 1985 ..... App. 25

Illinois Obscenity Statute, Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20 ..... App. 39

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

CHARLES G. MORRISON,

Defendant.

RELEVANT DOCKET ENTRIES

September 28, 1983—Motion to Dismiss filed

January 31, 1984 —Motion to Dismiss heard and continued to February 6, 1984, at 9:30 a.m. for decision

April 3, 1984 —* * * Trial Proceeds. * * * Jury Instructions given to jury. Jury retires. Jury returns verdict finding the defendant, Charles G. Morrison, guilty of Count I Obscenity, guilty of Count II Obscenity, and guilty of Count III Obscenity in the manner and form as charged in the complaint.

May 3, 1984 —Post-Trial Motion for Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative, for a New Trial filed.

June 4, 1984 —* * * Defendant's Motion (Post-Trial) to dismiss conviction, heard and denied. Conviction on verdict of jury stands. * * *

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4116

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

vs.

RICHARD POPE,
Defendant.

RELEVANT DOCKET ENTRIES

September 28, 1983—Motion to Dismiss filed.

January 31, 1984 —Motion to Dismiss heard and continued to February 6, 1984, at 9:30 a.m. for decision.

September 10, 1984—* * * Defendant's oral motion to dismiss heard and denied. * * *

September 11, 1984—* * * Trial Proceeds. Motion by defendant for directed verdict at close of State's evidence heard and denied. Trial proceeds. Motion by defendant for directed verdict at close of all evidence heard and denied. Jury retires. Jury returns verdict finding the defendant, Richard Pope, guilty of Count I, Obscenity, guilty of Count II, Obscenity and guilty of Count III, Obscenity in the manner and form as charged in the amended information.

September 25, 1984—* * * Judgment of conviction entered.

October 4, 1984 —Post-Trial Motion for Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative, for a New Trial filed.

October 15, 1984 —* * * Post-Trial Motion for Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative, for a New Trial heard and denied.

* * *

State of Illinois

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
County of Winnebago

No. 83CM4114

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

CHARLES G. MORRISON

Defendant

AMENDED INFORMATION

(Filed March 19, 1984)

The State's Attorney of said County charges:

COUNT I

That on the 21st day of July, 1983, County of Winnebago and State of Illinois, CHARLES G. MORRISON committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, sold a certain Obscene magazine, entitled Solo Suck Off, in violation of Paragraph 11-20 (a) (1), Chapter 38, Illinois Revised Statutes.

COUNT II

That on the 21st day of July, 1983, County of Winnebago and State of Illinois, Charles G. Morrison committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise

reasonable inspection which would have disclosed the nature or content thereof, sold a certain obscene magazine, entitled Rubber Suckers, in violation of Paragraph 11-20 (a) (1), Chapter 38, Illinois Revised Statutes, and further,

COUNT III

That on the 21st day of July, 1983 in the County of Winnebago and State of Illinois, Charles G. Morrison committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, sold a certain obscene magazine, entitled She-Male Subjugation, in violation of Paragraph 11-20 (a) (1), Chapter 38, Illinois Revised Statutes.

(Affidavit and bail setting omitted in printing)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

No. 83-CM-4114

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

CHARLES GARY MORRISON,

Defendant.

MOTION TO DISMISS

(Filed September 28, 1983)

NOW COMES the defendant, CHARLES GARY MORRISON, by his attorney, J. STEVEN BECKETT of RENO, O'BYRNE & KEPLEY, and for his motion to dismiss the information herein, and in support thereof, alleges and states as follows:

1. That the information is legally insufficient and violates the defendant's rights to proper notice under the First and Fourteenth Amendments to the Constitution of the United States, and under Chapter 38, § 111-3, Ill.Rev. Stat., in that said information fails to allege the necessary material elements of the legal definition of obscenity.

2. That the information and statute under which it is brought, namely Ill.Rev.Stat., Ch. 38, ¶11-20, are so vague, indefinite, uncertain and overbroad so as to fail to give guidance as to the conduct to be proscribed, in violation of the defendant's rights under the First and Fourteenth

Amendments to the Constitution of the United States. Further, that the history of the statute upon which the information is based is as follows:

(a) Said statute was enacted in its present form in 1961;

(b) Said statute has been judicially construed multiple times without further legislative revision, including the following:

(i) The third element of the tripartite test under *Memoirs v. Massachusetts*, 383 U.S. 415, 86 S.Ct. 975 (1966), "utterly without redeeming social value", was added by judicial construction. *People v. Ridens* (*Ridens I*), 51 Ill.2d 410, 282 N.E.2d 691 (1972), vacated and remanded as *Ridens v. Illinois*, 413 U.S. 912, 93 S.Ct. 3046 (1973); *People v. Thomas*, 37 Ill.App.3d 320, 346 N.E.2d 190 (1976); *People v. Stromblad*, 55 Ill.App.3d 511, 370 N.E.2d 1181 (1977).

(ii) A statewide "community standard" has been imposed by judicial construction. *People v. Price*, 8 Ill.App.3d 158, 289 N.E.2d 280 (1972); *People v. Ridens* (*Ridens II*), 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied, 421 U.S. 993, 95 S.Ct. 2000 (1975); *Eagle Books v. City of Rockford*, 66 Ill.App.3d 1038, 384 N.E.2d 493 (1978).

(iii) That part (b) of the tripartite test of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973), including the explanatory examples (a) and (b), have been judicially engrafted onto the statute in *Ward v. Illinois*, 431 U.S. 767, 97 S.Ct. 2085 (1977).

(c) That unless judicially construed otherwise, the statute is unconstitutional in the following respects:

(i) It allows the trier of fact to consider the effect of materials on children as part of the relevant community, Chapter 38, ¶11-20(c), in violation of principles announced in *Pinkus v. United States*, 436 U.S. 293, 98 S.Ct. 1808 (1978).

(ii) It fails to require that the element of "utterly without redeeming social value" be adjudged solely on an objective basis as opposed to reference to contemporary community standards. *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756 (1977), *United States v. Heyman*, 562 F.2d 316 (4th Cir., 1977), and *State v. Princess Cinema of Milwaukee, Inc.*, — Wis. —, 292 N.W.2d 807 (1980).

(iii) It fails to allow an affirmative defense for a dissemination to all adults instead of certain special classifications of persons (Ch. 38, ¶11-20 (f)(2)). *People v. Wrench*, 83 Misc.2d 95, 371 N.Y.S.2d 833 (1975).

3. That the Illinois Obscenity Statute, as written and as judicially construed, is unconstitutionally vague, indefi-

nite, uncertain, overbroad, and fails to give guidance as to the conduct prescribed, all in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States; in addition, further judicial construction of said statute in an attempt to save the statute should be declined. *State v. Princess Cinema of Milwaukee, Inc.*, — Wis. —, 292 N.W.2d 807 (1980).

4. That the standards set forth by the United States Supreme Court with respect to state obscenity statutes, as utilized by the Illinois Supreme Court with respect to Chapter 38, ¶11-20, Illinois Revised Statutes, are so vague, indefinite, uncertain and overbroad that said standards violate defendant's rights to notice under the First and Fourteenth Amendments to the Constitution of the United States. *Ward v. Illinois*, 431 U.S. 767, 777, 97 S.Ct. 2085, 2091 (1977).

5. That there exists no compelling governmental interest to constitutionally permit prosecution for the communication of ideas via speech and press regarding sexual matters, thereby rendering the said Illinois Obscenity Statute, Chapter 38, ¶11-20, Illinois Revised Statutes (1981), unconstitutional.

6. That the material in question under the information, namely the magazines entitled "Solo Suckoff", "Rubber Suckers", and "She-Male Subjugation" may not be criminally proscribed and are protected by the First Amendment to the Constitution of the United States as a matter of law; further, that the court is required to make an independent judicial review under principles announced in *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750 (1974), *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974), and *People v. Ward*, 63 Ill.2d 437, 349 N.E.2d 47 (1976).

7. That the materials which form the basis of the charge herein were only made available to consenting adults and were not foisted on unconsenting adults or made available to minors; further, that prosecution for sale or distribution of the materials in this context violates the right of privacy guaranteed by the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States and the penumbra of the Bill of Rights.

WHEREFORE, the defendant, CHARLES GARY MORRISON, prays that the court would make an independent constitutional determination of the obscenity *vel non* of the materials that are the subject of this charge and, further, that the information against him be dismissed and that the Illinois Obscenity Statute, Ch. 38, ¶11-20, be declared unconstitutional for one or more of the aforementioned reasons.

CHARLES GARY MORRISON,
Defendant
/s/ J. Steven Beckett
His Attorney

J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY
P.O. BOX 693
CHAMPAIGN, IL 61820

OF COUNSEL:

DANIEL CAIN
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321 WEST STATE
SUITE 803
ROCKFORD, IL 61101

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

CHARLES G. MORRISON,

Defendant.

PEOPLE'S INSTRUCTION NO. 12

A thing is obscene if considered as a whole, its predominant appeal is to a prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and, it goes substantially beyond customary limits of candor in its description or representation of such matters; for example, by a patently offensive description or representation of ultimate sexual acts, normal or perverted, actual or simulated, or by a patently offensive description or representation of masturbation, excretory functions, or lewd exhibition of the genitals, and, it is utterly without redeeming social value.

In determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole State of Illinois rather than by the people in any single city or town or region within the State.

IPI No. 9.57

People's Instruction No. 12

(Given over objection)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

CHARLES G. MORRISON,

Defendant.

DEFENDANT'S INSTRUCTION NO. 1

You must not judge this material by your own personal standards, even if you are personally offended by the material; rather, your verdict must be based on the evidence and testimony presented in this case, and your determination of what the community standards for the State of Illinois with respect to the obscenity or non-obscenity of the material are.

Defendant's Instruction No. 1

Not I.P.I.

Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887 (1974)

(Given over objection)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff.

vs.

CHARLES G. MORRISON,

Defendant.

DEFENDANT'S INSTRUCTION NO. 5

A thing is obscene if:

(1) considered as a whole, applying contemporary community standards, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion; and

(2) it is patently offensive to contemporary community standards in its description and representation of sexual matters; and

(3) it is utterly without redeeming social value.

All three elements must exist in each magazine before you can find that each is obscene. If you do not find that the elements described above in subparagraphs 1, 2 and 3 all exist in each magazine, then that magazine may not be found to be obscene.

Defendant's Instruction No. 5
I.P.I. 9.57 (Modified)

(Refused)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

CHARLES G. MORRISON,

Defendant.

DEFENDANT'S INSTRUCTION NO. 6

The court instructs the jury that in order to find material obscene the jury must conclude that the average adult, applying contemporary community standards, would find the material is obscene. Under Illinois law, a statewide standard must be used in making this determination. These contemporary community standards are to be utilized on only the first two parts of the tripartite test for obscenity and not on the question of whether the material is utterly without redeeming social value.

Defendant's Instruction No. 6

Not I.P.I.

People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974);
People v. Butler, 49 Ill.2d 435, 275 N.E.2d 400 (1971);
State of Wisconsin v. Princess Cinema, — Wis. —, 292 N.W.2d 807 (1980).

(Refused)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

No. 83-CM-4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff.

vs.

CHARLES G. MORRISON,

Defendant.

POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

(Filed May 3, 1984)

NOW COMES the defendant, CHARLES G. MORRISON, by his attorney, J. STEVEN BECKETT of RENO, O'BYRNE & KEPLEY, and for his post-trial motion for a judgment of acquittal ntowithstanding the verdict of guilty returned by the jury in the above-mentioned cause, or in the alternative, for a new trial, and in support thereof alleges and states as follows:

1. That the trial court erred in denying the defendant's motion to dismiss and all of its included allegations regarding the amended information, the Illinois Obscenity Statute, and the communicative materials on trial, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

2. That the trial court erred in allowing into evidence, over the defendant's objection, testimony of Officer

Olsen regarding statements and conduct of the defendant after he had been placed under arrest and was in custody with free movement restrained, which said statements and conduct were obtained in violation of the defendant's right against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. That the trial court erred in giving People's Instruction No. 12 and in refusing Defendant's tendered instruction No. 5. and thus improperly instructed the jury on the correct nature and application of the tripartite test of obscenity under Illinois law, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

4. That the trial court erred in refusing defendant's tendered instruction No. 7 which correctly recited the necessary and applicable principles of law of obscenity where a defendant adduces evidence regarding community standards, in violation of defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

5. That the state failed to meet its burden of proof beyond a reasonable doubt to adduce testimony demonstrating the materials on trial offended contemporary community standards for the State of Illinois when, during voir dire, the jury conclusively established that it would be unable to ascertain such a standard without evidentiary assistance, and in the face of testimony adduced by the defendant that the materials did not offend community standards for the State of Illinois, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States. *People v. Ridens,*

59 Ill.2d 362, 321 N.E.2d 264 (1974); *People v. Nelson*, 88 Ill.App.3d 196, 410 N.E.2d 476 (1980).

6. That the trial court erred in permitting the Assistant State's Attorney during closing argument to state on multiple occasions, over the defendant's objection, that the jury as members of the community of Illinois could determine whether the materials on trial were obscene, and in addition, said prosecutor made other arguments directed to the personal bias and prejudice of the jurors regarding obscenity and availability of materials to minors. While the trial court sustained defendant's objection to improper argument of the Assistant State's Attorney, on the whole, said argument was so prejudicial and constituted an appeal to the personal feelings of the jury that it violated the defendant's right to a fair trial in an obscenity case under principles of the First, Sixth and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, the defendant, CHARLES G. MORRISON, prays that the court would enter a judgment of acquittal notwithstanding the verdict in this case or, in the alternative, would grant the defendant a new trial.

CHARLES G. MORRISON,
Defendant

BY: J. STEVEN BECKETT

/s/ J. Steven Beckett
His Attorney

(Certificate of Service omitted in printing)

State of Illinois

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT

County of Winnebago

No. 83 CM 4116

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

RICHARD POPE

Defendant

INFORMATION

(Filed July 22, 1983)

The State's Attorney of said County charges:

COUNT I

That on the 21st day of July, 1983, County of Winnebago and State of Illinois, RICHARD POPE committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, sold a certain obscene magazine, to-wit: Full Throttle, in violation of Paragraph 11-20 (a) (1), Chapter 38, Illinois Revised Statutes.

COUNT II

That on the 21st day of July, 1983, RICHARD POPE committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, sold a certain

obscene magazine, to-wit: Fuck Around in violation of Para. 11-20 (a) (1), Chapter 38. Illinois Revised Statutes.

COUNT III

That on the 21st day of July, 1983, RICHARD POPE committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, sold a certain obscene magazine, to-wit: Anal Animal in violation of Paragraph 11-20(a)(1), Chapter 38, Illinois Revised Statutes.

DANIEL D. DOYLE
State's Attorney of
Winnebago County

By: Daniel F. Torrisi
Assistant State's Attorney

(Portions stricken by oral amendment prior to trial deleted and affidavit and bail setting omitted in printing)

IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS
No. 83-CM-4116

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

RICHARD POPE,

Defendant.

MOTION TO DISMISS

(Filed September 28, 1983)

NOW COMES the defendant, RICHARD POPE, by his a ttorney, J. STEVEN BECKETT of RENO, O'BYRNE & KEPLEY, and for his motion to dismiss the information herein, and in support thereof, alleges and states as follows:

1. That the information is legally insufficient and violates the defendant's rights to proper notice under the First and Fourteenth Amendments to the Constitution of the United States, and under Chapter 38, § 111-3. Ill.Rev. Stat., in that said information fails to allege the necessary material elements of the legal definition of obscenity.

2. That the information and statute under which it is brought, namely Ill.Rev.Stat., Ch. 38, ¶ 11-20, are so vague, indefinite, uncertain and overbroad so as to fail to give guidance as to the conduct to be proscribed, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States. Further, that the history of the statute upon which the information is based is as follows:

(a) Said statute was enacted in its present form in 1961;

(b) Said statute has been judically construed multiple times without further legislative revision, including the following:

(i) The third element of the tripartite test under *Memoirs v. Massachusetts,* 383 U.S. 415, 86 S.Ct. 975 (1966), "utterly without redeeming social value", was added by judicial construction. *People v. Ridens (Ridens I),* 51 Ill.2d 410, 282 N.E.2d 691 (1972), vacated and remanded as *Ridens v. Illinois,* 413 U.S. 912, 93 S.Ct. 3046 (1973); *People v. Thomas,* 37 Ill. App.3d 320, 346 N.E.2d 190 (1976); *People v. Stromblad,* 55 Ill.App.3d 511, 370 N.E.2d 1181 (1977).

(ii) A statewide "community standard" has been imposed by judicial construction. *People v. Price,* 8 Ill.App.3d 158, 289 N.E.2d 280 (1972); *People v. Ridens, (Ridens II),* 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied, 421 U.S. 993, 95 S.Ct. 2000 (1975); *Eagle Books v. City of Rockford,* 66 Ill.App.3d 1038, 384 N.E.2d 493 (1978).

(iii) That part (b) of the tripartite test of *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607 (1973), including the explanatory examples (a) and (b), have been judicially engrafted onto the statute in *Ward v. Illinois,* 431 U.S. 767, 97 S.Ct. 2085 (1977).

(c) That unless judicially construed otherwise, the statute is unconstitutional in the following respects:

(i) It allows the trier of fact to consider the effect of materials on children as part of the relevant

community, Chapter 38, ¶ 11-20(c), in violation of principles announced in *Pinkus v. United States,* 436 U.S. 293, 98 S.Ct. 1808 (1978).

(ii) It fails to require that the element of "utterly without redeeming social value" be adjudged solely on an objective basis as opposed to reference to contemporary community standards. *Smith v. United States,* 431 U.S. 291, 97 S.Ct. 1756 (1977), *United States v. Heyman,* 562 F.2d 316 (4th Cir., 1977), and *State v. Princess Cinema of Milwaukee, Inc.,* — Wis. —, 292 N.W.2d 807 (1980);

(iii) It fails to allow an affirmative defense for a dissemination to all adults instead of certain special classifications of persons (Ch. 38, ¶ 11-20(f)(2)). *People v. Wrench,* 83 Misc.2d 95, 371 N.Y.S.2d 833 (1975).

3. That the Illinois Obscenity Statute, as written and as judicially construed, is unconstitutionally vague, indefinite, uncertain, overbroad, and fails to give guidance as to the conduct prescribed, all in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States; in addition, further judicial construction of said statute in an attempt to save the statute should be declined. *State v. Princess Cinema of Milwaukee, Inc.,* — Wis. —, 292 N.W.2d 807 (1980).

4. That the standards set forth by the United States Supreme Court with respect to state obscenity statutes, as utilized by the Illinois Supreme Court with respect to Chapter 38, ¶ 11-20, Illinois Revised Statutes, are so vague, indefinite, uncertain and overbroad that said standards

violate defendant's rights to notice under the First and Fourteenth Amendments to the Constitution of the United States. *Ward v. Illinois,* 431 U.S. 767, 777, 97 S.Ct. 2085, 2091 (1977).

5. That there exists no compelling governmental interest to constitutionally permit prosecution for the communication of ideas via speech and press regarding sexual matters, thereby rendering the said Illinois Obscenity Statute, Chapter 38, ¶ 11-20, Illinois Revised Statutes (1981), unconstitutional.

6. That the material in question under the information, namely the magazines entitled "Full Throttle", "Fuck Around", and "Anal Animal" may not be criminally proscribed and are protected by the First Amendment to the Constitution of the United States as a matter of law; further, that the court is required to make an independent judicial review under principles announced in *Jenkins v. Georgia,* 418 U.S. 153, 94 S.Ct. 2750 (1974), *People v. Ridens,* 59 Ill.2d 362, 321 N.E.2d 264 (1974), and *People v. Ward,* 63 Ill.2d 437, 349 N.E.2d 47 (1976).

7. That the materials which form the basis of the charge herein were only made available to consenting adults and were not foisted on unconsenting adults or made available to minors; further, that prosecution for sale or distribution of the materials in this context violates the right of privacy guaranteed by the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States and the penumbra of the Bill of Rights.

WHEREFORE, the defendant, RICHARD POPE, prays that the court would make an independent constitu-

tional determination of the obscenity *vel non* of the materials that are the subject of this charge and, further, that the information against him be dismissed and that the Illinois Obscenity Statute, Ch. 38, ¶ 11-20, be declared unconstitutional for one or more of the aforementioned reasons.

RICHARD POPE, Defendant

/s/ J. Steven Beckett
His Attorney

J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY
P.O. BOX 693
CHAMPAIGN, IL 61820

OF COUNSEL:

DANIEL CAIN
SREENAN & CAIN
321 WEST STATE
SUITE 803
ROCKFORD, IL 61101

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83-CM 4116

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff

vs.

RICHARD POPE,

Defendant.

DEFENDANT'S INSTRUCTION NO. 2

A magazine is obscene if:

(1) Considered as a whole, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and

(2) It depicts or describes, in a patently offensive way, sexual conduct; for example, by a patently offensive description or representation of ultimate sexual acts, normal or perverted, actual or simulated, or by a patently offensive description or representation of masturbation, excretory functions, or lewd exhibition of the genitals; and

(3) It is utterly without redeeming social value.

You must find that all three elements exist in the magazine for it to be obscene.

In determining whether a magazine is obscene, you must not judge it by your own personal standards, even if you are personally offended by the material.

Your verdict must be based on the evidence and testimony in this case and your determination of community

standards for the State of Illinois; that is, how the magazine would be viewed by ordinary adults in the whole state rather than by the people in any single city or town or region within the state.

GIVEN X — Defendant's Instruction No. 2

REFUSED— — I.P.I. 9.57 (Modified)

Ward v. Illinois, 431 U.S. 767, 97 S.Ct. 2085 (1977)
People v. Butler, 49 Ill.2d 435, 275 N.E.2d 400 (1971)
People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974)
Eagle Books v. City of Rockford, 66 Ill.App.3d 1038, 384 N.E.2d 493 (1978)
People v. Nelson, 88 Ill.App.3d 196, 410 N.E.2d 476 (1980)

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL DISTRICT
WINNEBAGO COUNTY, ILLINOIS
No. 83-CM-4116

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs.

RICHARD POPE,
Defendant.

POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

(Filed October 4, 1984)

NOW COMES the defendant, RICHARD POPE, by his attorneys, Reno, O'Byrne & Kepley, P.C., and for his post-trial motion for judgment of acquittal notwithstanding the verdict of guilty returned by the jury in the above-mentioned case, or in the alternative, for a new trial, and in support thereof alleges and states as follows:

1. That the trial court erred in denying the defendant's motion to dismiss and all of its included allegations regarding the information, the Illinois Obscenity Statute, and the communcative materials on trial, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

2. That Counts I, II, and III of the information, which were amended on their face immediately prior to trial upon the motion of the state by striking out the

words "to John Versetti at 623 7th Street, Rockford, Illinois", further fail to state an offense in that the person to whom the magazines were allegedly sold is not specified. Said omission fails to adequately advise the defendant of the charges against him, and further fails to protect the defendant from future prosecutions arising out of the same acts, thus rendering all counts of the information void and violating the defendant's rights under the First, Sixth, and Fourteenth Amendments to the Constitution of the United States.

3. That the trial court erred in sustaining the State's objections during *voir dire* to defendant's questions relating to the following:

(a) Whether the jury had a pre-conceived notion that merely because sexual intercourse was portrayed in a magazine, such portrayal automatically made the magazine obscene;

(b) Whether the jury believed that an adult should be allowed to see or read anything that he or she wants to in the privacy of his or her home.

4. That the trial court erred in admitting certain pictures marked as People's exhibits 7 and 8 over defendant's objection on relevancy grounds.

5. That the trial court erred in admitting certain pictures marked as People's exhibits 9, 10, 11, 12, 13, 14, 15, 16, and 17 over defendant's objections on relevancy grounds and on grounds that said pictures were prejudicial, focusing in on the covers of certain magazines or on certain items which were unrelated to the charges and which magazines were not displayed as a whole.

6. That the trial court erred in giving People's instruction number 10 and in refusing defendant's tendered

instructions number 3, 4, and 5, thus confusing the jury and allowing it to return a verdict of guilty on the charge of obscenity as it related to one or more of the magazines without all of the necessary elements being proved beyond a reasonable doubt as to any one magazine.

7. That the trial court erred in refusing defendant's tendered instructions number 6 and 7, which correctly recited the necessary and applicable principles of the law of obscenity where a defendant adduces evidence regarding community standards, in violation of defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

8. That the trial court erred in refusing defendant's instruction number 8.

9. That the state failed to meet its burden of proof beyond a reasonable doubt to adduce testimony demonstrating the materials on trial offended contemporary community standards for the State of Illinois when, during *voir dire*, the jury conclusively established that it would be unable to ascertain such standard without evidentiary assistance, and in the face of testimony adduced by the defendant that the materials did not offend community standards for the State of Illinois, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States. *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974); *People v. Nelson*, 88 Ill.App.3d 196, 410 N.E.2d 476 (1980).

10. That the state failed to meet its burden of proof beyond a reasonable doubt as to the element of knowledge or *scienter* on the part of the defendant.

11. That the trial court erred in permitting the Assistant State's Attorney during closing arguments to state, over the defendant's objection, that the jury, based upon its own feelings and knowledge, could determine that the materials on trial were obscene, thus leading the jury to believe that it could apply a personal standard rather than a state-wide community standard, violating the defendant's right to a fair trial in an obscenity case under principles of the First, Sixth, and Fourteenth Amendments to the Constitution of the United States.

12. That the trial court erred in permitting the Assistant State's Attorney during closing argument to suggest, over the defendant's objection, that the jury could convict the defendant of the crime of obscenity on something less than proof of all of the necessary elements, thus violating defendant's right to a fair trial in an obscenity case under principles of the First, Sixth, and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, the defendant, RICHARD POPE, prays that the court would enter a judgment of acquittal notwithstanding the verdict in this case or, in the alternative, would grant the defendant a new trial.

RICHARD POPE, Defendant

By: Reno, O'Byrne & Kepley, P.C.
His Attorneys

By: /s/ Glenn A. Stanko

(Certificate of Service omitted in printing)